U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 19 December 2006

Case No.: 2004BLA06330

IN THE MATTER OF:

A.R.
Survivor of B.R.

v.

SHAMROCK COAL CO. INC,
Employer

and

SUN COAL CO., INC., c/o
ACORDIA EMPLOYERS SERVICE
Carrier

and

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS
Party in Interest

APPEARANCES:

Monica Rice Smith, Esq.
For the Claimant

Lois A. Kitts, Esq.
For the Employer

BEFORE: Daniel A. Sarno, Jr.
Administrative Law Judge

DECISION AND ORDER DENYING SURVIVOR'S BENEFITS

This case arises from a claim for benefits filed under the "Black Lung Benefits Act," Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, at 30 U.S.C.

§ 901 *et seq.* ("Act"), and the implementing regulations at 20 C.F.R. Parts 718 and 725 (2006).[1] In this case, a hearing was held in Hazard, Kentucky on February 7, 2006. Accordingly, the decision in this matter is based upon the testimony at the hearing, all documentary evidence admitted into the record, and the post-hearing arguments of the parties. At the hearing the following exhibits were admitted into the record: *Director's Exhibits* (*DX*) 1 through 33, *Claimant's Exhibit* (*CX*) 1, and *Employer's Exhibits (Ex)* 1 through 9. Upon review of the evidence, the Presiding Judge finds that some of the exhibits admitted at the hearing should have been excluded. Therefore, for the reasons stated below, the following exhibits, or portions thereof, have been excluded from the record and were not considered in the adjudication of this case: *DX* 1, to the extent that it includes medical evidence; *Ex* 3; *Ex* 6; and *Ex* 7.

The Benefits Review Board ("BRB") has held that in claims governed by the amended regulations, the evidentiary limitations at 20 C.F.R. § 725.414 are mandatory and cannot be waived by the parties. *Smith v. Martin County Coal Corp.*, 23 B.L.R. 1-69 (2004). Accordingly, for survivor's claims filed pursuant to the revised regulations, medical evidence submitted as part of a prior living miner's claim must be designated as evidence by one of the parties to the survivor's claim in order for it to be included in the record for the survivor's claim. *See Church v. Kentland-Elkhorn Coal Corp.*, BRB Nos. 04-0617 BLA and 04-0617 BLA-A (Apr. 8, 2005) (unpub.). In this case, neither party designated any medical evidence from the prior living miner's claim as evidence to be used in the claim that is currently before the court. As a result, Director's Exhibit 1, to the extent that it includes medical evidence, should not have been admitted at the hearing and is therefore excluded from the record.

In this case, Employer's Exhibit 7 is also being excluded from the record. Employer's Exhibit 7 does not substantially comply with the quality standards set forth in 20 C.F.R. § 718.106, which require that an autopsy report include both a detailed gross macroscopic and microscopic description of the lungs or visualized portion of a lung.[2] *See* 20 C.F.R. § 718.106 and *Kalist v. Buckeye Coal Co.*, BRB No. 03-0743 BLA (July 23, 2004) (unpub.). Furthermore, to the extent that Employer's Exhibit 7 considers other evidence, the report is a medical report under 20 C.F.R. §725.414(a)(1) and cannot be considered in this case because Employer has already designated evidence that it wishes to use as its two medical reports. On the other hand, because Employer submitted the autopsy report written by the physician who actually performed the autopsy to the district director (*DX* 10), the Presiding Judge will consider this report as Employer's one autopsy report under 20 C.F.R. §725.414(a)(3)(i). Moreover, because

[1] The Secretary of Labor adopted amendments to the regulations implementing the Federal Coal Mine Health and Safety Act of 1969 as set forth in the Federal Register, 65 Fed. Reg. 79,920 (Dec. 20, 2000). These revised regulations became effective on January 19, 2001. Id. Accordingly, because Claimant filed her claim on February 3, 2003 (*DX* 3) the amended regulations are applicable in this case. Moreover, as the miner last engaged in coal mine employment in the state of Kentucky, appellate jurisdiction of this matter lies with the Sixth Circuit Court of Appeals. *Shupe v. Director, OWCP*, 12 B.L.R. 1-200, 1-202 (1989)(en banc).

[2] In the instant case, if Employer's designated autopsy report (*EX* 7) is in fact an autopsy report and, as the report designated by Employer, should have been admitted and considered in this case *instead of* Director's Exhibit 10 (Employer may still only submit one autopsy report as initial evidence), the disposition of this case would not be affected. Specifically, the Presiding Judge would still find that Claimant in this case did not establish all elements of her claim by a preponderance of the evidence. Even without taking into consideration any evidence proffered in this case by Employer, the Presiding Judge would still find the remaining evidence in this case to be legally inadequate to prove all elements of Claimant's case by a preponderance of the evidence. *See Eastover Mining Co., v. Williams*, 338 F.3d 501, 518 (6th Cir. 2003).

Employer's Exhibit 7 is being excluded, Employer's Exhibits 3 and 6 are also being excluded.[3] After reviewing these exhibits, the Presiding Judge finds that Employer's Exhibits 3 and 6 are physician's reports that wholly rely on Employer's Exhibit 7.

Overview of the Black Lung Program

Entitlement to benefits under the Black Lung Benefits Act is not automatic, nor do benefits serve as a pension or retirement program for coal miners or their survivors. Rather, the Black Lung Benefits Act is designed to compensate miners or survivors of miners in cases where the miners acquired pneumoconiosis, commonly referred to as "black lung disease," while working in the Nation's coal mines. Those miners who have worked in or around mines and have inhaled coal mine dust over a period of time, may contract black lung disease. This disease may eventually render the miner totally disabled or contribute to his death.

Procedural History

On February 3, 2003, Claimant A.R., the widow of B.R., the deceased miner, filed a claim for survivor's benefits.[4] (*DX* 3.) On February 12, 2004, the district director issued his Proposed Decision and Order denying benefits. (*DX* 26.) On February 20, 2004, Claimant timely filed her request for a formal hearing. (*DX* 27.) The case was then referred to the Office of Administrative Law Judges for a hearing on May 25, 2004, and thereafter assigned to this office.[5] (*DX* 31.)

By Notice of Hearing and Order issued October 7, 2005, a hearing was scheduled to be held on February 7, 2006, in Hazard, Kentucky. At the hearing, the Presiding Judge ordered that the record be held open for sixty days for the submission of post-hearing briefs. *TR* 15:19-22. The Presiding Judge received Claimant's brief on April 3, 2006. Employer filed a motion to file its brief out of time on May 30, 2006. In this case, because Claimant does not object to Employer's brief being admitted into the record and because the Presiding Judge finds that neither party will be prejudiced by allowing Employer to submit its brief out of time, Employer's motion is granted and its brief is admitted into the record.

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[3] Assuming *arguendo* that these exhibits should have been admitted into the record (*see* footnote 2), the disposition of this case would not be affected. The Presiding Judge would still find that Claimant has failed to establish all elements of her claim by a preponderance of the evidence. Accordingly, in this case, Employer's Exhibits 3 and 6 are merely cumulative.

[4] The miner B.R. filed a state claim to recover disability benefits on April 27, 1988. (*DX* 7.) In a decision issued October 2, 1989, the miner was found to have pneumoconiosis and was awarded benefits. (*DX* 7.) A federal living miner's claim was filed by B.R. on April 8, 1987, which was subsequently denied in a decision issued by Administrative Law Judge Daniel Stewart on April 23, 1992, which was thereafter affirmed by the Benefits Review Board on October 26, 1994. (*DX* 1.)

[5] By motion dated March 24, 2005, the Director, OWCP moved to amend the List of Director's Exhibits (*DX* 32) to reflect the fact that Director's Exhibit 1 contains 689 pages, rather than 709 pages. That motion is GRANTED and Director's Exhibit 32 has been corrected to accurately reflect the number of pages contained in Director's Exhibit 1.

Issues Presented for Adjudication[6]

The contested issues remaining in this case post-hearing are: (1) did the miner suffer from pneumoconiosis; (2) did the pneumoconiosis arise out of coal mine employment; and (3) did the miner die due to pneumoconiosis. *(DX* 31; Employer's Br.)

Findings of Fact and Conclusions of Law

I. Background – Lay Evidence

At the hearing, in addition to withdrawing several issues that were listed as contested on the CM-1025 form by stipulation, the parties also stipulated, and the Presiding Judge now finds, that Claimant has no dependents and that Claimant's husband worked as a coal miner for at least 18 years. (Trial Record ("TR") 5:4-8.)

Also at the hearing, Claimant, the miner's widow, testified. Claimant stated that she and the miner B.R. married on January 8, 1977 and that they remained married and lived together until B.R.'s death in 2002. (TR 10:3-7.) Claimant further testified that she had not remarried subsequent to her husband's death. (TR 10:8-9.)

At the hearing, Claimant also briefly testified about her observations regarding her husband's working conditions while he was a miner. Claimant testified that during the time when her husband B.R. worked as a miner, he would come home every day "black all over with coal dust." (TR 10:10-19.)

The final part of Claimant's testimony addressed her husband's medical problems. (TR 10:20-15:4.) Claimant states that B.R. had breathing, heart, and back problems. (TR 11:1-6.) With regard to B.R.'s heart problems, Claimant states that B.R. took medication and that B.R. had a heart attack in 1986. (TR 12:19-13:3.) Claimant states that her husband was being treated by Dr. Anand for his heart problems. (TR 13:12-17.) With regard to B.R.'s back problems, Claimant states that the problems developed gradually due to Claimant's work in the mines. (TR 13:6-11.) Claimant states that her husband was treated by Dr. Cornett, his family doctor, and a chiropractor for his back problems. (TR 13:18-24.)

With regard to B.R.'s breathing problems, Claimant testified at the hearing that she did not recall when his problems began. (TR 14:3-6.) Claimant testified that as a result of B.R.'s breathing problems, there were times when her husband was barely able to walk through the house and that he was unable to do things around the house such as yard work. (TR 11:7-11, 14:16-18.) Moreover, Claimant stated that her husband had difficulty sleeping at night because he smothered and would have to sit up. (TR 14:22-15:4.) At the hearing, Claimant further testified that her husband had a constant cough (TR 11:16-12:1), and that although her husband had smoked when he was young, he did not smoke during the time he was married to Claimant.[7]

[6] The Presiding Judge notes that there are several issues listed as contested by Employer on the CM 1025 form for purposes of appeal only. *(DX* 31; TR 5:10-12.) Those issues will not be addressed in this Decision.

[7] Claimant states in her answers to interrogatories that her husband smoked a pack of cigarettes per day from 1981 to 1986. (*DX* 18 Interrog. 9.) The miner's medical records indicate that the miner may have smoked a pack of

(TR 14:7-15). According to Claimant, B.R. had been prescribed pills at some point for his breathing problems and had to use an inhaler twice a day, once in the morning and once at night. (TR 122:7-18.) Claimant stated that her husband was treated by Dr. Cornett for his breathing problems. (TR 12:2-6.)

II. Medical Evidence

The medical evidence in this case includes one chest X-ray, three medical opinions (reports, a supplemental report, and deposition testimony), a death certificate, and the miner's hospitalization and treatment records.

A. Chest X-rays. (*DX* 14.)

In this case, only one X-ray has been admitted into the record. On July 9, 2003, Dr. Paul Wheeler, a Board-certified radiologist and B-reader, interpreted an X-ray dated December 24, 2001, which had a film quality of 2. (*DX* 14.) Dr. Wheeler read this X-ray as 0/0 and noted that the X-ray revealed no abnormalities consistent with pneumoconiosis. (*DX* 14.)

B. Autopsy or Biopsy. (*DX* 10.)

On December 9, 2002, Dr. Shiu-Kee Chan, qualifications unknown, performed an autopsy on Claimant's husband, which was specifically limited to the chest for the purpose of determining whether the miner had black lung. (*DX* 10.) The autopsy protocol included a summary of Dr. Chan's gross examination. Specifically, with regard to the miner's body cavities, Dr. Chan stated the following:

> The muscles are well-developed. The diaphragm is at the level of the 6th intercostal space, left, and 7th intercostal space on the right. There is no hiatal hernia. The pleural cavity shows mild fibrous adhesions.

(*DX* 10.) With regard to the miner's lungs, Dr. Chan provided the following information:

> Right lung – 1008 grams
> Left lung – 996 grams
>
> RESPIRATORY SYSTEM
> The pleural surface is grey-tan to black-grey in color and slightly rough. Sections of both lungs are tan-grey to dark red in color and soft. There is no black nodule or macules in the section of the lungs. Both lungs show marked congestion and edema. The trachea and major bronchus are slightly congested.

(*DX* 10.)

Upon microscopic examination of the miner's lungs, Dr. Chan made the following findings:

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cigarettes per day for as long as 20 years. (*DX* 13 at 48, 52.)

> Sections of both lungs show extensive pulmonary edema and congestion. The pleura shows mild fibrosis. There is [sic] no black nodules. No disposition of black pigment or fibrosis in the respiratory bronchi is identified."

(*DX* 10.)

Based on the foregoing, Dr. Chan made three final anatomical diagnoses: (1) pulmonary edema and congestion, bilateral; (2) pleural adhesions, mild, bilateral; and (3) no evidence of coal workers' pneumoconiosis. (*DX* 10.)

B. Medical Opinions.

In this case, the medical opinions of three physicians have been admitted into in the record:

Medical Opinion of Dr. Ashwini Anand (CX 1.)

As evidence in this case, Claimant has submitted an undated letter written by Dr Anand. Dr. Anand's medical qualifications are unknown. Dr. Anand's opinion reads as follows:

> [The miner, B.R.] was my patient at his last admission to the hospital for acute subendocardial myocardial infarction. He was treated for the MI until he was stable and had cardiac catheterization that showed severe three vessel coronary and sever left ventricular dysfunction. He was intubated twice and suffered cardiac arrest twice during that admission prior to his death. In spite of aggressive management of his heart failure, he continued to deteriorate and his black lung was the cause of his deterioration and he was aggressively treated for the lung disease. Pulmonology was consulted and managed his ventilation. He received IV steroids, nebulizer treatments, and antibiotics, but continued to deteriorate.
>
> The black lung was certainly the final cause of his death, with the heart failure and coronary disease as contributing factors.
>
> Signed R.A. Anand

Medical Opinion of Dr. David Rosenberg (EX 1, 2, and 4.)

In a report dated September 1, 2005, Dr. Rosenberg, who is a B-reader and Board-certified in internal medicine with a subspecialty in pulmonary disease (*EX* 4 at Ex. 1), reviewed Claimant's husband's hospitalization and treatment records, death certificate, the X-ray report of Dr. Wheeler, and autopsy report prepared by Dr. Chan.[8] (*EX* 1.) After thoroughly reviewing the foregoing documents in his report, Dr. Rosenberg provided the following summary:

[8] Dr. Rosenberg is also certified in the subspecialty of occupational medicine. (*EX* 4 at Ex. 1.)

> In **SUMMARY**, [the miner B.R.] died at 64 years of age and had a long history of coronary artery disease, having had bypass surgery with persistent angina. Thereafter, he was found to have occluded coronary artery grafts and was treated for his heart condition over the years medically and with angioplasty and stent insertion. He eventually presented with unstable angina and pulmonary edema, had several cardiac arrests and thereafter eventually expired. Over the years, he also was treated for hypertension, diabetes, hyperlipidemia and at times some exacerbations of airways disease. Pulmonary function tests were limited, but his FEV_1% (FEV_1/FVC) was normal. His pathology at the time of autopsy revealed no evidence of CWP. Also, roentgenographically he did not have any micronodularity or macule formation.

(*EX* 1.)

Based on his review of the foregoing documents, Dr. Rosenberg concluded that the miner did not have coal workers' pneumoconiosis ("CWP") and that the miner's death was in no way related to either CWP or the miner's previous exposure to coal dust. (*EX* 1.) Specifically, Dr. Rosenberg stated that neither the X-ray nor autopsy revealed evidence of clinical CWP. (*EX* 1.) Dr. Rosenberg also pointed out that "[n]o valid pulmonary function tests were included in the file, with only one recorded FVC maneuver." (*EX* 1.) Moreover, Dr. Rosenberg stated that the miner did not have chronic obstructive pulmonary disease ("COPD"). (*EX*1.) Dr. Rosenberg based this opinion on the 0/0 negative X-ray reading by Dr. Wheeler, the normal FEV_1% (FEV_1 / FVC) value of 84% contained in the miner's hospitalization and treatment records, and several relevant scholarly articles.[9] (*EX* 1; *EX* 4 at Ex. 3.) Dr. Rosenberg opined that, "[w]hile [the miner] was treated in 1996/1997 for airways disease, this probably represented an acute asthmatic bronchitis type of condition which resolved over time." (*EX* 1.)

With regard to the miner's death, Dr. Rosenberg stated that "it related to the acute coronary insufficiency caused by severe coronary artery disease." (*EX* 1.) Dr. Rosenberg also stated that the miner's "death from coronary insufficiency would have occurred independently of his past coal mine employment." (*EX* 1.) Moreover, Dr. Rosenberg noted that the miner's right ventricle was normal and that [i]f someone had CWP which was causing significant impairment, cor pulmonale would have been expected to be present." (*EX* 1.)

Dr. Rosenberg concluded his report by stating the following:

> In **CONCLUSION**, it can be stated with a reasonable degree of medical certainty that [the miner] did not have CWP or associated impairment. From a pulmonary perspective, he had no associated impairments or disability and could have performed his previous coal mining job. His death was from coronary insufficiency and was not related to or hastened by past coal dust exposure or the presence of CWP.

(*EX* 1.)

[9] The FEV1% from the treatment record is actually 87%. (DX 13 at 49.)

In a supplemental report dated December 28, 2005, Dr. Rosenberg reviewed the undated report written by Dr. Anand and considered it in conjunction with the other evidence he had previously considered. (*EX* 2.) Based on his review of the foregoing, Dr. Rosenberg reiterated his opinions from his September 1, 2005 report: the miner did not have CWP and his death was in no way related to CWP or the miner's previous exposure to coal dust. (*EX* 2.) With regard to his opinion that the miner did not have CWP, which was based in part on the autopsy findings of Dr. Chan, Dr. Rosenberg further explained that "the minimal requirement for diagnosing [CWP] pathologically is the coal macule, which forms in and around the terminal bronchiole," and that "[t]his coal macule is represented by anthracotic laden macrophages, combined with reticulin formation and focal emphysema." (*EX* 2.) In this case, Dr. Chan found that the miner "did not have pathologic findings of CWP." (*EX* 2.)

In a deposition taken on January 10, 2006, Dr. Rosenberg provided his credentials (*EX* 4 at 3-4, 19) and described the general procedure he follows in evaluating a miner for CWP for a Federal black lung claim (*EX* 4 at 4 -19, Ex. 1). Thereafter, Dr. Rosenberg summarized the miner's medical documents that he had reviewed, the medical research articles he reviewed, and the opinions he rendered in his September 1, 2005 (*EX* 2) and December 28, 2005 (*EX* 3) reports. (*EX* 4 at 19 -28.) As part of this testimony, Dr. Rosenberg acknowledged that a miner with as little as eight years of coal dust exposure could develop CWP, although it would be unlikely, and that B.R.'s work history of 22 years of coalmine employment, with 7-8 years spent above ground, was a sufficient history for the miner to develop CWP if he was susceptible to the disease. (*EX* 4 at 17, 26.) Dr. Rosenberg also stated that coal dust exposure does not cause the type of pulmonary edema or fluid accumulation that the miner in this case suffered from. (*EX* 4 at 26-27.) On the other hand, Dr. Rosenberg did state that CWP or the inhalation of coal dust can cause obstructive lung disease. (*EX* 4 at 27.) Nevertheless, in this case, Dr. Rosenberg opined that the miner's COPD was not related to the inhalation of coal mine dust. (*EX* 4 at 27.) Specifically, Dr. Rosenberg stated that the miner's COPD, as manifested or outlined in his medical records, which described his condition as episodes of coughing and congestion, acute bronchitis, and wheezing, was treated with bronchodilators and corticosteroid antibiotics. (*EX* 4 at 27.) Dr. Rosenberg stated that these treatments are "for an asthmatic type of component," a "reversible component" which is not a condition related to past coal mine dust exposure. (*EX* 4 at 27.) Dr. Rosenberg further stated that "[i]n addition, there's no evidence in the file of airflow obstruction, as defined by the FEV_1 divided by the FVC, which is the FEV_1%." (*EX* 4 at 27-28.) Dr. Rosenberg stated that the miner "was totally normal, and that's how you define the presence of airflow obstruction related to COPD." (*EX* 4 at 28.)

Medical Opinion of Dr. Matthew Vuskovich (EX 5, 8.)

In a medical report dated September 22, 2005, Dr. Vuskovich, who is Board-certified in occupational medicine and a B-reader (*EX* 8), provided his opinions regarding whether Claimant's husband had coal worker's pneumoconiosis ("CWP") and whether CWP caused or hastened his death. (*EX* 5.) In his report, Dr. Vuskovich noted the miner's weight, height, smoking history, and employment history. (*EX* 5.) Dr. Vuskovich also noted the miner's extensive history of heart problems. (*EX* 5.) Thereafter, Dr. Vuskovich summarized in great detail the information set forth in the miner's hospitalization and treatment records regarding the

miner's respiratory and pulmonary health, as well as the X-ray report of Dr. Wheeler and the autopsy report generated by Dr. Chan. (*EX* 5.)

Based on the foregoing, Dr. Vuskovich gave several opinions. (*EX* 5.) First, Dr. Vuskovich opined that the miner did not have clinical CWP because the chest X-ray image interpretations and autopsy findings were not compatible with clinical coal workers' pneumoconiosis. (*EX* 5.)

Next, Dr. Vuskovich stated that, based on the information he reviewed, it was not possible for him to say "with a reasonable degree of certainty" if the miner had legal CWP, chronic pulmonary impairment that could be attributed to coal dust exposure, prior to his death. (*EX* 5) On the other hand, with regard to whether pneumoconiosis was a substantially contributing cause of the miner's disabling respiratory impairment, if he in fact had such an impairment, Dr. Vuskovich opined that there "is no evidence that [the miner] was experiencing permanent pulmonary impairment." (*EX* 5) Dr. Vuskovich further stated that [i]ntermittently, [the miner] would experience pulmonary impairment as a consequence of congestive heart failure with pulmonary edema, the accumulation of fluid within the air-exchange lung organs (alveoli)," but that "[t]his type of reversible pulmonary impairment is not caused by or aggravated by coal dust exposures or by coal workers' pneumoconiosis." (*EX* 5) "It is exclusively a hemodynamic process, which in the case of the miner, "resulted from a heart that could not effectively pump blood." (*EX* 5)

In this report, Dr. Vuskovich also opined that the inhalation of coal mine dust was not a substantially contributing cause of the miner's death. (*EX* 5) Dr. Vuskovich further stated that the miner's employment in the coal mining industry could have in fact protected the miner from the health problems that Dr. Vuskovich opined were factors that contributed to the miner's death, such as obesity, diabetes, and coronary heart disease. (*EX* 5)

Dr. Vuskovich also opined that CWP did not have a material adverse effect on the miner's heart condition and subsequent pulmonary condition. (*EX* 5) Dr. Vuskovich stated that "[e]ven if [the miner] had legal coal workers' pneumoconiosis or early-category simple coal workers' pneumoconiosis these would have been considered an incidental findings [sic] that did not contribute to the hemodynamic mechanisms that led to his death." (*EX* 5)

With regard to whether CWP materially worsened a totally disabling respiratory impairment which was caused by a disease or exposure unrelated to coal mine employment, Dr. Vuskovich opined that it did not. Specifically, Dr. Vuskovich provided the following opinion in his report:

> Pulmonary edema the intermittent respiratory impairment that [the miner] experienced was caused by deadly cardiac anatomical and hemodynamic factors. Because his heart could not effectively pump blood, [the miner] would intermittently develop congestive heart failure with secondary respiratory failure. The medical evidence did not describe the malignant anatomical and hemodynamic changes associated with complicated coal workers' pneumoconiosis (PMF).

(*EX* 5)

Dr. Vuskovich also opined that the miner did not have chronic obstructive pulmonary disease ("COPD"). (*EX* 5) Dr. Vuskovich stated that the "[c]hest X-ray image interpretations and the autopsy findings were not compatible with COPD." (*EX* 5)

Finally, Dr. Vuskovich provided his opinion regarding whether the miner's death was in any way related to CWP:

> No[,] the pneumoconioses, including coal workers' pneumoconiosis though preventable, are not treatable diseases. Even if [the miner] did have coal workers' pneumoconiosis it was incidental to the true causes of death. [The miner] died of these preventable and treatable disease:
>
> - Obesity was preventable and treatable
> - High blood pressure
> - Coronary heart disease
> - Diabetes mellitus
> - Congestive heart failure
> - Acute myocardial infarction
>
> Even though [the miner] was exposed to coal dust, the fact that he was physically active as a coal miner contributed to extending his life. Epidemiological studies have demonstrated that coal miners live as long as members of the general population. Though they are more likely to die from respiratory diseases they are less likely to die from certain cancers, including lung cancer. They are less likely to die from a heart attack.

(*EX* 5) Dr. Vuskovich stated that his "statements are supported by information from standard texts and the body of scientifically valid peer reviewed medical literature" and that all his "statements and responses are held to be within the realm of reasonable medical probability and reasonable medical certainty." (*EX* 5)

D. Other Medical Evidence.

Death Certificate (DX 9.)

The death certificate for the miner, filed on January 9, 2003, states that Claimant's husband died at 1:00 A.M. on December 8, 2002, at Marymount Medical Center. (*DX* 9.) Claimant's husband, who was born on November 19, 1938, died at the age of 64 years old. (*DX* 9.) The stated immediate cause of death was acute myocardial infarction, with underlying conditions leading to the immediate cause of death listed as being coronary artery disease and atherosclerosis. (*DX* 9.) The death certificate also provides a space for listing other significant conditions that contributed to the miner's death, but did not result in the underlying conditions listed on the certificate. (*DX* 9.) This space is blank on the miner's death certificate. (*DX* 9.)

The death certificate is signed by Dr. Ashwini R. Anand, who thereby certified that to the best of his knowledge, the miner's death "occurred at the time, date, place and due to the causes stated" on the certificate. (*DX* 9.) Moreover, the certificate states that the miner had diabetes and that the manner of death was "natural." (*DX* 9.) The death certificate also states that an autopsy was performed on the miner and that the autopsy findings were available prior to the completion of the cause of death portion of the death certificate. (*DX* 9.)

Hospitalization and Treatment Records (DX 11, 12, 13, 15, 16.)

As a preliminary matter, the Presiding Judge notes that the miner's records in this case contain various physician's treatment and consultation reports, X-ray reports, values from a pulmonary function study, and values from an arterial blood-gas study. After thoroughly reviewing Director's Exhibits 11, 12, 13, 15, and 16, the Presiding Judge finds that all the aforementioned materials are hospitalization or treatment records under 20 C.F.R. §725.414(a)(4).[10]

Included in the record are hospitalization and treatment records of Claimant's husband from Christian Healthcare Services, Inc., dated December 16, 1992 through March 1, 2002 (*DX* 11); Marymount Medical Center, dated November 12, 2002 through January 30, 2003 (*DX* 12); Mary Breckenridge Health Care, Inc., dated June 20, 1979 through November 11, 2002 (*DX* 13); Memorial Hospital, dated December 30, 1999 through November 12, 2002 (*DX* 15); and The Heart Doctors P.S.C., dated July 6, 1995 through July 6, 2000 (*DX* 16). These records document the miner's treatment for various ailments, including acute myocardial infarction, pulmonary edema, coronary artery disease, adult onset diabetes mellitus, angina, shortness of breath, cough, chronic obstructive pulmonary disease, bronchitis, pneumonia, and pneumoconiosis. (*DX* 11-13, 15-16.) The records also document that the miner worked as a coal miner inside coal mines for 22 years and outside for 7-8 years (DX 13 at 11), and that the miner was a former smoker who smoked either a pack of cigarettes a day for 20 years (DX 13 at 48, 52) or between 1 ½ to 2 packs of cigarettes a day for many years (DX 13 at 11). The records also document that the miner died on December 8, 2002 at approximately 4:20 A.M. (*DX* 12 at 3.)

The Standard for Entitlement

Because this claim was filed in February of 2003, it is governed by the regulations at 20 C.F.R. Part 718. Under § 718.205, where there is no miner's claim filed prior to January 1, 1982 resulting in entitlement to benefits, then a survivor who files a claim after January 1, 1982, as in this case, is entitled to benefits only upon demonstrating that the miner died due to pneumoconiosis.[11] Specifically, Claimant bears the burden of establishing each of the following elements by a preponderance of the evidence: (1) that the miner suffered from pneumoconiosis; (2) his pneumoconiosis arose out of coal mine employment; and (3) that he died due to pneumoconiosis. *See* 20 C.F.R. §§ 718.205(a), 725.212(a)(3)(ii); *Gee v. W.G. Moore & Sons*, 9

[10] With regard to the physician's notes in this case, unlike the letter by Dr. Ducu in the BRB unpublished decision, *Stamper v. Westerman Coal Co.*, BRB No. 05-0946 BLA (Jul. 26, 2006) (unpub.), the physician's notes in the instant case do not assess the miner's level of disability due to a respiratory or pulmonary condition.

[11] Because the survivor's claim was not filed prior to June 30, 1982, the presumption contained at 20 C.F.R. § 718.306 is inapplicable and will not be discussed further.

B.L.R. 1-4 (1986)(en banc); *Baumgartner v. Director, OWCP*, 9 B.L.R. 1-65 (1986)(en banc). Evidence which is in equipoise is insufficient to sustain Claimant's burden in this regard. *Director, OWCP v. Greenwich Collieries, et al.*, 114 S. Ct. 2251 (1994), *aff'g sub. nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730 (3d Cir. 1993). Failure to establish any one of these elements precludes entitlement to benefits.

I. Existence of Pneumoconiosis and its Etiology[12]

In a survivor's claim, it must first be determined whether the miner suffered from coal workers' pneumoconiosis before a finding may be made regarding the etiology of the miner's death. *Trumbo v. Reading Anthracite Co.*, 17 B.L.R. 1-85 (1993). The regulations define Pneumoconiosis as a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment." 20 C.F.R. § 718.201(a). Pneumoconiosis is recognized as "a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. § 718.201(c). Under the amended regulations, the definition of pneumoconiosis includes both clinical and legal pneumoconiosis:

> (1) Clinical Pneumoconiosis. "Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconiosis, i.e., the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.
>
> (2) Legal Pneumoconiosis. "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.

20 C.F.R. § 718.201(a)(1)-(2). For the purpose of defining pneumoconiosis, "a disease 'arising out of coal mine employment' includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. § 718.201(b).

Moreover, the regulations at 20 C.F.R. § 718.203(b) provide that, if it is determined that the miner suffered from pneumoconiosis and has engaged in coal mine employment for ten years or more, as in this case, there is a rebuttable presumption that the pneumoconiosis arose out of such employment. If, however, it is established that the miner suffered from pneumoconiosis but

[12] The Presiding Judge finds that the doctrine of collateral estoppel is not applicable in this case with regard to either the miner's prior federal (*DX* 1) or state (*DX* 7) black lung claims. *See Napier v. Director*, OWCP, 999 F.2d 1032, 1035-36 (6th Cir. 1993) (*res judicata*); *Island Creek Coal Co. v. Alexander*, 884 F.2d 579, 1989 WL 99457 *1 (6th Cir. 1989) (unpub.) (*collateral estoppel*); *Hughes v. Clinchfield Coal Co.*, 21 B.L.R. 1-, 1-137 n.2 (1994) (*collateral estoppel*).

worked less than ten years in the coal mines, then Claimant must establish causation by competent medical evidence. 20 C.F.R. § 718.203(c) (2005). *See also Stark v. Director, OWCP*, 9 B.L.R. 1-36 (1986); *Hucker v. Consolidation Coal Co.*, 9 B.L.R. 1-137 (1986).

The existence of pneumoconiosis may be established by any one or more of the following methods: (1) chest X-rays; (2) autopsy or biopsy; (3) by operation of presumption; or (4) by a physician exercising sound medical judgment based on objective medical evidence. 20 C.F.R. § 718.202(a).

A. Chest X-rays

In this case, as previously stated, there is only one X-ray report in the record, which was interpreted by Dr. Wheeler, who is dually qualified as both a B-reader and a Board-certified Radiologist. Dr. Wheeler read the X-ray, film quality 2, as 0/0 and found that it revealed no abnormalities consistent with pneumoconiosis. Accordingly, the Presiding Judge finds that Claimant has not established by a preponderance of the X-ray evidence that the miner suffered from pneumoconiosis.

B. Autopsy or Biopsy

Pursuant to 20 C.F.R. § 718.202(a)(2), pneumoconiosis may be established through biopsy or autopsy evidence which is submitted in accordance with the quality standards at § 718.106 of the regulations. Section 718.202(a)(2) further states that a "report of autopsy shall be accepted unless there is evidence that the report is not accurate or that the claim has been fraudulently represented" and that a "finding in an autopsy or biopsy of anthracotic pigmentation … shall not be sufficient, by itself, to establish the existence of pneumoconiosis. 20 C.F.R. § 718.202(a)(2).

In the instant case, there is only one autopsy report in the record. Dr. Chan, whose qualifications are unknown, performed the autopsy on Claimant's husband and wrote the autopsy protocol. Upon gross examination of the miner's respiratory system, Dr. Chan noted that there were no black nodules or macules in the section of the lungs. Upon microscopic examination of the miner's lungs, Dr. Chan noted that, while the pleura showed mild fibrosis, there were no black nodules and Dr. Chan identified no disposition of black pigment or fibrosis in the respiratory bronchi. Overall, Dr. Chan found that there was *no evidence of pneumoconiosis*. Accordingly, based on Dr. Chan's unrebutted autopsy findings, the Presiding Judge finds that Claimant has not proven by a preponderance of the autopsy evidence that the miner suffered from pneumoconiosis.

C. Operation of Presumption

In this case, the presumptions found in §§ 718.304 to 718.306 of Title 20 of the regulations are inapplicable.

D. Medical Opinion

The final method by which Claimant may establish that he suffers from pneumoconiosis is by well-reasoned, well-documented medical opinions rendered by physicians exercising sound medical judgment based on objective medical evidence, such as blood-gas studies, electrocardiograms, pulmonary function studies, physical performance tests, physical examination, and medical and work histories. *See* 20 C.F.R. 718.202(a)(4). A "documented" opinion is one that sets forth the clinical findings, observations, facts and other data on which the physician based the diagnosis. *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19 (1987). An opinion may be adequately documented if it is based on items such as a physical examination, symptoms, and the patient's history. *See Hoffman v. B&G Construction Co.*, 8 B.L.R. 1-65 (1985); *Hess v. Clinchfield Coal Co.*, 7 B.L.R. 1-295 (1984). An opinion which is better supported by the objective medical evidence of record may be accorded greater probative value. *Minnich v. Pagnotti Enterprises, Inc.*, 9 B.L.R. 1-89, 1-90 n.1 (1986); *Wetzel v. Director, OWCP*, 8 B.L.R. 1-139 (1985).

A "reasoned" opinion is one in which the administrative law judge finds the underlying documentation adequate to support the physician's conclusions. *Fields, supra*. Indeed, whether a medical opinion is sufficiently documented and reasoned is for the administrative law judge as the finder-of-fact to decide. *See Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989)(en banc). Moreover, legal pneumoconiosis is established by well-reasoned medical opinions, which support a finding that the miner's pulmonary or respiratory condition is significantly related to or substantially aggravated by coal dust exposure. *See Wilburn v. Director, OWCP*, 11 B.L.R. 1-135 (1988).

Moreover, in the Sixth Circuit, "in black lung litigation, the opinions of treating physicians get the deference they deserve based on their power to persuade." *Eastover Mining Co., v. Williams*, 338 F.3d 501, 513 (6th Cir. 2003). Accordingly, although the regulations set forth specific factors which must be considered in assigning weight to a treating physician's opinion, such as the nature and duration of the relationship and the frequency and extent of treatment, a treating physician's opinion is not automatically accorded greater weight than the opinions of non-treating physicians. *Id.* at 512; 20 C.F.R. §718.104(d).

As summarized above, the medical opinion evidence in this case consists of the opinions of Dr. Anand, Dr. Rosenberg, and Dr. Vuskovich. Based on a thorough review of these opinions, the Presiding Judge finds that the preponderance of the medical opinion evidence in this case supports a finding that Claimant's husband, the miner, did not suffer from either legal or clinical coal workers' pneumoconiosis ("CWP").

Specifically, the Presiding Judge finds that Dr. Anand's opinion is neither well-documented nor well-reasoned. As previously stated, Dr. Anand, whose qualifications are unknown, opined in an undated letter that black lung disease was the cause of the miner's deterioration and the final cause of the miner's death. Yet, Dr. Anand's letter provides no documentation or clarification explaining why he believes the miner had CWP. Moreover, Dr. Anand's opinion is not supported by his treatment records from Marymount Medical Center or the objective medical evidence in this case, such as Dr. Wheeler's X-ray report or the autopsy protocol written by Dr. Chan. Furthermore, the Presiding Judge notes that, although Dr. Anand was a treating physician of the miner, Dr. Anand's opinion provides no insight into whether the

miner in fact suffered from CWP. Overall, the evidence in the record does not justify according Dr. Anand's conclusory opinion that the miner had CWP any additional weight based on the fact that Dr. Anand treated the miner during his final hospitalization. In this case, Dr. Anand's opinion has no real probative value and the Presiding Judge finds that it is entitled to *very* little weight. Accordingly, the Presiding Judge finds that Dr. Anand's opinion, *standing alone*, is legally insufficient to prove that the miner had CWP. Nevertheless, while the Presiding Judge notes that his finding regarding Dr. Anand's opinion, in light of the fact that Claimant submitted no other evidence in support of her case, is a sufficient basis for finding that Claimant has failed to meet her burden of proof for this element, for the sake of completeness, the Presiding Judge has also reviewed the medical opinion evidence submitted by the Employer in this case and reconciled the various opinions of the three physicians.

In this case, Dr. Rosenberg, who is a B-reader and Board-certified in internal medicine with a subspecialty in pulmonary disease, opined that the miner did not have CWP. Specifically, Dr. Rosenberg opined that the miner did not have clinical CWP because neither the X-ray report by Dr. Wheeler nor the autopsy protocol by Dr. Chan revealed any evidence of clinical CWP. Dr. Rosenberg also opined that the miner did not have chronic obstructive pulmonary disease ("COPD"). Dr. Rosenberg based this opinion on the fact that the miner's FEV_1% from his treatment records was normal and the fact that his "COPD," as manifested and outlined in his medical records, was treated with bronchodilators and corticosteroid antibiotics. Dr. Rosenberg explained that these treatments are for an asthmatic and reversible type of condition, which is not related to past coal mine dust exposure. Accordingly, Dr. Rosenberg concluded that, "it [could] be stated with a reasonable degree of medical certainty that [the miner] did not have CWP or associated impairment." (*EX* 1.)

The final medical report in this case is provided by Dr. Vuskovich. In his report, Dr. Vuskovich opined that the miner did not suffer from clinical CWP or COPD, because none of the chest X-ray image interpretations or autopsy findings he reviewed were compatible with either of those diseases. The Presiding Judge notes that Dr. Vuskovich did not offer an opinion regarding whether the miner suffered from legal CWP. Dr. Vuskovich stated in his report that, based on the information he reviewed, it was not possible for him to say "with a reasonable degree of certainty" whether or not the miner had legal CWP, which he defined as chronic pulmonary impairment that could be attributed to coal dust exposure. On the other hand, Dr. Vuskovich did state that he found no evidence that the miner was experiencing permanent pulmonary impairment. Rather, Dr. Vuskovich noted that it appeared the miner would intermittently "experience pulmonary impairment as a consequence of congestive heart failure with pulmonary edema," but that this "type of reversible pulmonary impairment was not caused by or aggravated by coal dust exposures or [CWP]." (*EX* 5.) Overall, it appears that, although Dr. Vuskovich felt that he could not state with reasonable certainty that the miner did not have legal CWP, based on the information he reviewed, Dr. Vuskovich found that there was no evidence of legal CWP.

In this case, based on the foregoing, the Presiding Judge finds both Drs. Rosenberg's and Vuskovich's opinions to be well-documented and well-reasoned. The reports of both physicians clearly set forth the information and evidence upon which the physicians relied in formulating their opinions. Moreover, unlike Dr. Anand's opinion, Drs. Rosenberg's and Vuskovich's

opinions are supported by the objective medical evidence in this case, such as the autopsy report by Dr. Chan.

In reconciling the opinions of the three physicians in this case, the Presiding Judge took into consideration the relationship between the miner and the physicians, the qualifications of the physicians, whether the opinions were well-reasoned and well-documented, whether the reports were internally consistent, and whether the opinions relied on and were otherwise consistent with the objective medical evidence admitted into the record. Based on these factors, as discussed in detail above, the Presiding Judge finds that Dr. Rosenberg's opinion is entitled to the most weight. The Presiding Judge also finds that Dr. Vuskovich's opinion is entitled to a great deal of deference and that Dr. Anand's opinion, as previously stated, is entitled to very little weight. Accordingly, the Presiding Judge finds that the preponderance of the medical opinion evidence in this case is that the miner did not have either legal or clinical CWP.

E. Conclusion

Based on a thorough review of the evidence presented in this case, the Presiding Judge finds that the preponderance of all evidence demonstrates that Claimant's husband did not have either clinical or legal pneumoconiosis as defined in the amended regulations. Consequently, Claimant has failed to prove two elements of her claim and is therefore not eligible for benefits under the Act.

II. Establishing Death Due to Pneumoconiosis

Benefits are provided under the Act for survivors of miners who died due to pneumoconiosis. 20 C.F.R. § 718.205. The regulations at § 718.205(c) state that a miner's death will be considered due to pneumoconiosis if competent medical evidence establishes that: (1) the miner died due to pneumoconiosis; or (2) pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or the death was caused by complications of pneumoconiosis; or (3) the presumption of § 718.304 is applicable.[13] The regulations further state that pneumoconiosis is a substantially contributing cause of a miner's death if it "hastens" the miner's death. 20 C.F.R. § 718.205(c)(5). In the Sixth Circuit, "[l]egal pneumoconiosis only 'hastens' a death if it does so through a specifically defined process that reduces the miner's life by an estimable time." *Eastover Mining Co., v. Williams*, 338 F.3d 501, 518 (6th Cir. 2003) (holding that a physician's opinion was conclusory and legally inadequate where the physician opined that a miner's pneumoconiosis hastened the miner's death, which was ultimately caused by a pulmonary embolus, because pneumoconiosis weakened the miner by causing his body to lack oxygen and excessively retain carbon dioxide).

In this case, Claimant has failed to prove by a preponderance of the evidence that her husband died due to pneumoconiosis. Claimant has presented no competent medical evidence in support of her claim. As stated in the foregoing section, the only evidence submitted by

[13] Because there is no evidence of complicated pneumoconiosis in this record, the presumption at § 718.304 is inapplicable and will not be discussed further. Moreover, the lay evidence provisions at § 718.204(c)(5) are inapplicable as this survivor's claim was filed after January 1, 1982. *See also Gessner v. Director, OWCP*, 11 B.L.R. 1-1, 1-3 (1987).

Claimant in this case is a letter written by Dr. Anand, which the Presiding Judge finds to be neither well-documented nor well-reasoned. Furthermore, based on the fact that Dr. Anand certified the miner's death certificate, which lists other causes for the miner's death, the Presiding Judge finds Dr. Anand's opinion, as expressed in the undated letter, to not be credible.[14] The Presiding Judge notes that the miner's death certificate lists the miner's immediate cause of death as acute myocardial infarction, with underlying conditions of the immediate cause of death being coronary artery disease and atherosclerosis. Moreover, pneumoconiosis is not listed on the certificate, even though there is a space provided for listing other significant conditions that contributed to the miner's death that are unrelated to the underlying conditions. Overall, the Presiding Judge finds Dr. Anand's opinion regarding the miner's cause of death, as expressed in the miner's death certificate, to be far more consistent with Dr. Anand's own treatment notes, the hospitalization records from Marymount Medical Center and the objective medical evidence presented in this case. Notably, no evidence in the record, including Dr. Anand's undated letter, either explains or supports Dr. Anand's complete change in opinion regarding the cause of the miner's death. In this case, it cannot reasonably be said that Dr. Anand's opinion in the undated letter is a mere clarification of his earlier opinion expressed in the miner's death certificate. Accordingly, under these circumstances, in Presiding Judge reconciles Dr. Anand's two contrary opinions by finding that the opinion Dr. Anand expressed in the miner's death certificate, which the Presiding Judge finds to be credible, is Dr. Anand's true opinion regarding the cause of the miner's death.[15]

Moreover, in this case, other evidence presented on this issue includes the autopsy protocol written by Dr. Chan, and the medical opinions written by Drs. Vuskovich and Rosenberg. First, with regard to the autopsy protocol, after examining the miner's lungs both macroscopically and microscopically, Dr. Chan found no evidence of pneumoconiosis. In this case, the Presiding Judge finds Dr. Chan's findings, as summarized in his autopsy protocol, to be credible and highly probative of whether the miner did in fact die due to pneumoconiosis.

With regard to the medical opinions offered by Drs. Vuskovich and Rosenberg, both physicians opined that the miner's death was in no way due to or hastened by pneumoconiosis or the miner's previous exposure to coal dust. Review of the physicians' reports reveals that both Drs. Vuskovich and Rosenberg based their opinions on thorough review of the miner's hospitalization and treatment records and the other objective medical evidence admitted in this case. Moreover, review of Drs. Vuskovich and Rosenberg's reports also reveals that their opinions are consistent with the objective medical evidence in this case. Accordingly, the Presiding Judge finds both physicians' opinions to be well-documented, well-reasoned, and entitled to great deference. As a result, upon review of all relevant evidence in this case, the Presiding Judge finds that the preponderance of the evidence is that the miner did not die due to pneumoconiosis. Therefore, Claimant has failed to establish this element of her claim and is not entitled to benefits under the Act.

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[14] The Presiding Judge notes that there appears to be a discrepancy between the signatures of Dr. Anand on the death certificate and on his undated letter. Most notably, the order of Dr. Anand's first and middle initial appear to be reversed on the undated letter: the signature on the death certificate reads Ashwini R. Anand while the signature on the undated letter reads RA Anand.

[15] As a result, the Presiding Judge notes that there is no credible evidence in this case that the miner died due to pneumoconiosis.

ORDER

For the reasons stated in the foregoing discussion, IT IS ORDERED that the claim for benefits filed by A.R. is DENIED.

A

Daniel A. Sarno, Jr.
Administrative Law Judge

DAS/mam

NOTICE OF APPEAL RIGHTS: If you are dissatisfied with the administrative law judge's decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days from the date on which the administrative law judge's decision is filed with the district director's office. *See* 20 C.F.R. §§ 725.478 and 725.479. The address of the Board is:

Benefits Review Board
U.S. Department of Labor
P.O. Box 37601
Washington, DC 20013-7601

Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. *See* 20 C.F.R. § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

At the time you file an appeal with the Board, you must also send a copy of the appeal letter to Allen Feldman, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. *See* 20 C.F.R. § 725.481. If an appeal is not timely filed with the Board, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).